IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10074 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SARAL INDUSTRIES

Versus

UNION OF INDIA -THROUGH-

Appearance:

1. Special Civil Application No. 10074 of 2004

MR NITIN K MEHTA for Petitioner No. 1

MR JITENDRA MALKAN for Respondent No. 1

DS AFF.NOT FILED (N) for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 12/10/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

#. Rule. Mr.Malkan learned standing counsel, on notice, waives service for the respondents. Mr.Malkan places on record the reply affidavit.

#. Show cause notice dated 21.03.1991 was issued to the petitioner calling upon it to show cause as to why excise duty of Rs.5,72,852.29 ps. should not be imposed under Rule 192 of the Central Excise Act and also penalty on the petitioner and the goods should also not be confiscated. Thereafter, Collector, Central Excise passed order-in-original dated 23.03.1993 and confirmed the demand of duty and also imposed penalty of Rs. 3 lacs on the petitioner and Rs. 1.5 lacs on the proprietor under Sub-rule 1 of Rule 173 Q of the Central Excise Rules (Annexure `E'). Against the same, an application with application for waiver of pre-deposit was filed before the Custom, Excise & Gold Appellate Tribunal, Mumbai (for short "CEGAT") and by an order dated 30.06.1993 the CEGAT granted complete waiver of pre-deposit on the ground of financial hardship of the petitioner (Annexure `F'). Later on, main appeal of the petitioner was finally disposed of by the CEGAT by its order dated 18.06.2002 by setting aside the order-in-original passed by the Commissioner with a direction to the Commissioner to decide the notice in accordance with law after considering the submissions of the petitioner (Annexure `G'). It is the case of the petitioner that inspite of this, the respondent no. 2 initiated second round of proceedings against the petitioner by raising issues which were already decided earlier by the CEGAT and once again the order-in-original was passed on 30.05.2003 imposing the same duty of Rs.5,72,852.29 ps. and penalty of Rs. 3 lacs on petitioner and Rs. 1 lac on the proprietor (Annexure `H'). Aggrieved by the same, the petitioner had filed appeal with stay application before the Commissioner (Appeals) which was disposed of by the Commissioner (Appeals) on 24.10.2003 (Annexure `I'). Aggrieved by the same, the petitioner had approached the Customs, Excise & Service Tax Appellate Tribunal (for short "CESTAT") by way of appeal no. E/313/04 (Annexure `J') with an affidavit that he is having precarious financial position and having no source of income and that he and his wife are dependant on his children (Annexure `K'). However, this time CESTAT decided the stay application by ordering the petitioner to pay pre-deposit of Rs. 3 lacs by 06.08.2004 and on that condition recovery was stayed. After depositing of the amount of Rs. 3 lacs, the appeal was ordered to be placed for hearing (Annexure `L'). This impugned order dated 02.06.2004 passed by the CESTAT

on application E/S/244/04 in appeal no. E/313/04 is challenged in this petition.

#. Learned standing counsel Shri Malkan relying on the judgment of the Division Bench of this very Court delivered on 10.09.2004 in Special Civil Application No. 11489 of 2004 submitted that when the CESTAT had exercised its jurisdiction and ordered the petitioner to deposit Rs. 3 lacs, then this court in its writ jurisdiction under Article 227 of the Constitution of India should not interfere with such orders. The same is not applicable on facts of this case. Therefore, we have refrained ourselves from dealing with the same in detail. However, Mr.Mehta for the petitioner submitted that in the instant case, the CESTAT had not considered the precarious financial condition of the petitioner while passing the impugned order which amounts to jurisdictional error. Therefore, this court should interfere with the order. Mr.Mehta has pointed earlier stay order dated 30.06.1993 passed by the CEGAT (Annexure `F') whereby the CEGAT had completely waived the pre-deposit of duty and penalty amount considering the financial condition of the petitioner. In the second round of litigation before the CESTAT, this very ground was taken by the petitioner in the stay application in para 7(K) and in ground 7(L), it was contended that the applicant's financial condition was in a bad shape due to business losses and poor liquidity. There was no counter to it. However, we find from the impugned order Annexure `L' dated 02.06.2004 passed by the CESTAT that this aspect, viz. poor financial condition of the petitioner, of this case was not at all considered by the Tribunal while passing the impugned order of waiver of pre-deposit.

#. In view of the above discussion, this petition is allowed and the impugned order at Annexure `L' dated 02.06.2004 passed by the CESTAT is hereby quashed and set aside and the matter is remanded to the learned Tribunal for deciding the stay application of the petitioner in accordance with law. While deciding the stay application, it is hope and trust that CESTAT will consider the poor financial condition of the petitioner and pass fresh order regarding waiver of pre-deposit. Rule is made absolute. No order as to costs.

(B.J.SHETHNA, J)

(SHARAD D DAVE, J)

srilatha